No. 12950

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH UMBERLAND MINING COMPANY, a Corporation,
Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF.

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Restatement of the Case.

Appellee has gone so far afield in its argument and has raised and argued so many issues foreign to the case that it becomes necessary for appellant, *North Umberland Mining Company, not defendant, George White,* to restate the case.

In the first place, appellee, Standard Accident Insurance Company (hereinafter referred to as Standard), seems to forget that it was the primary insurance carrier of George White. By Standard's policy which White paid for and which Standard dictated the terms of, Standard insured White against loss occasioned by his driving

his Packard automobile or by his driving any other automobile while the Packard was being repaired. All of this coverage was primary insurance.

By way of exception and proviso (all according to the terms of Standard's policy dictated by Standard), this insurance by Standard became excess only if White while driving another automobile had available to him "other valid and collectible insurance." [Tr. p. 57, Last paragraph.] Such exceptions according to the courts of last resort of California must be strictly construed against Standard and liberally in favor of the assured and coverage.

Mahsee v. North American Accident Insurance Co., 190 Cal. 421, 213 Pac. 42;

Reed v. Pacific Indemnity Co., 101 A. C. A. 177, 225 P. 2d 255.

White at the time of the accident was driving a Lincoln Zephyr automobile, and its owner appellant, North Umberland Mining Company, had the automobile insured with Home against liability occasioned by injury or death to persons while the automobile was being driven by its agents or any other person driving the automobile with the owner's consent.

But the Home policy provided by way of conditions precedent that no action would lie against the company unless (1) the person driving the automobile cooperated with the company after the accident and (2) until the

amount of the company's obligation to pay should have been finally determined by final judgment or by written agreement between the insured, the company and the claimant. [Tr. p. 61, condition 6.]

The question is thus presented: when, according to the provisions of Standard's policy (an escape provision and exception), does Standard's insurance cease to become primary and become excess insurance and at what point of time according to the provisions of Home's policy does that insurance become *collectible* and available to White according to said escape provision and exception of Standard's policy.

We make bold to say that these precise questions have never been decided by any appellate court either national or state. Therefore, the questions necessarily must be decided upon an analysis of the terms and conditions of the policies themselves according to well settled and defined principles of construction and not as appellee seeks to do by applying general rules of law which give no consideration to the question as to when according to the conditions and provisions of particular insurance policies does the insurance become collectible insurance.

I.
ARGUMENT IN REPLY.

A. Preliminary Statement.

Standard concedes that the controlling question on this appeal is when, if ever, did the Home insurance become collectible insurance. (App. Rep. Br. p. 12.) We submit that it never did become collectible insurance because the conditions precedent of the policy were never met, and therefore the judgment of the District Court should be reversed. This because, as this Court said on the prior appeal:

> "Under the Civil Code of California, a condition precedent is given the same force as that indicated in the policy (Home's) that we are now considering. Section 1439 provides in part 'Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; * * *' * * * and if the insured cannot bring himself within the conditions of the policy he is not entitled to recover for the loss * * *." (167 F. 2d 919.)

If Home never became or could not become *obligated* under its policy to White, and he could not recover for the loss under it, how could the insurance ever become collectible within the meaning of the *exception* in Standard's policy?

To adopt the argument of appellee is to read into the policies of Standard and Home provisions which are not there and to rewrite both policies. This the law will not permit. (*Standard Accident Insurance Company v. Home Indemnity Company,* 167 F. 2d 919.)

B. The Home Insurance Never Became Collectible.

Appellee contends that North Umberland Mining Company is in no better position than White himself, and in support of that proposition cites three cases, all of which hold that an injured person is in no better position than the insured under an insurance policy. It is obvious that these cases do not have any application in a case where a party is seeking to enforce his rights of subrogation under the provisions of Section 402 of the California Vehicle Code.

Appellee next asserts that the primary insurance afforded to White by his policy with Standard became excess insurance at the exact moment of the accident. (App. Rep. Br. pp. 10 to 18.) In undertaking to maintain this assertion appellee studiously ignores, as it must, the provisions of the Standard and Home policies and particularly the conditions of the Home policy and the well established rules of construction relating to insurance contracts. Appellee does not, and cannot, cite any case or textbook which lays down any rule or principle establishing when automobile liability insurance becomes collectible under the provisions and conditions set out in the Home policy.

The best that can be said of appellee's argument is that appellee complains that White by failing to cooperate under the Home policy precluded North Umberland Mining Company from enforcing its rights of subrogation. The obvious answer to this position of appellee is that for this Court to adopt it, Standard's policy and Home's policy must be rewritten by this Court and terms and provisions be inserted that are not there. Such, of course, as this Court has said, the law will not do. The only

answer that appellee has to our application of the rules of construction laid down by the Appellate Courts of California is "this is not so." (App. Rep. Br. p. 20.)

Appellee maintains that the following cases lay down the principle that other collectible insurance becomes collectible at the time of the happening of the accident:

Travelers Indemnity Company v. State Auto Insurance Company, 66 Ohio App. 457, 37 N. E. 2d 198;

State Farm Mutual Auto Insurance Company v. Hall, 292 Ky. 22, 165 S. W. 2d 838;

Trinity Universal Insurance Company v. General Accident etc. Corporation, 138 Ohio St. 488, 35 N. E. 2d 836;

Zurich v. Clamor, 124 F. 2d 717;

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Air Transport v. Employers, etc., 91 Cal. App. 2d 129, 204 P. 2d 647;

Gillies v. Michigan Millers, etc. Ins. Co., 98 A. C. A. 959;

Maryland Casualty Co. v. Hubbard, 22 Fed. Supp. 697;

Lehigh Valley, etc. v. Providence, etc., 127 Fed. 364.

In none of these cases was the question presented or decided as to when "other collectible insurance" became collectible. Neither was there presented in any of these cases a policy containing any of the conditions precedent contained in the Home policy, nor were any such conditions considered.

In *Travelers Indemnity Company v. State Auto Insurance Company,* 66 Ohio App. 457, 37 N. E. 2d 198 (App. Rep. Br. p. 14), the controversy between the insurance companies arose after judgment against the driver of the automobile had been rendered. The only question for decision presented or decided was which of the carriers was the primary carrier. A similar situation was presented in *State Farm Mutual Auto Insurance Company v. Hall,* 292 Ky. 22, 165 S. W. 2d 838. (App. Rep. Br. p. 15.) The same may be said of *Trinity Universal Insurance Company v. General Accident etc. Corporation,* 138 Ohio St. 488, 35 N. E. 2d 836. (App. Rep. Br. p. 16.) In addition, the provision of the policy in that case was "other insurance" and not other collectible and other valid insurance. In *Air Transport v. Employers, etc.,* 91 Cal. App. 2d 129, 204 P. 2d 647, so strongly relied upon by appellee (App. Rep. Br. pp. 17 to 18), the sole question for decision was whether an insurance company could escape liability under its policy under a provision invalidating the insurance if the assured had "other valid insurance." The District Court of Appeal put the question for decision thus: "It is the contention of appellant that its policy never covered respondents because they had 'other valid insurance' which consisted of the Pacific Indemnity policy and that under clause 8 of appellant's policy the omnibus clause became void as to respondents."

The court in that case did not have before it a policy providing that the insurance would be excess insurance in the event there was "other collectible insurance" but merely "other valid insurance." The question was not presented, nor did the court decide when, "other collectible insurance" became collectible, nor did the court have

before it a policy containing conditions similar to those contained in the Home policy. What has just been said applies to the remaining cases cited by appellee.

C. The Appeal Was Filed in Time.

Appellee maintains that our application for extension to file notice of appeal was not properly ordered because it was made *ex parte*. Counsel can cite no cases in support of this proposition, and for that matter they cannot complain that they were not heard because they filed motion to vacate the order extending the time which was heard and argued by the Court and denied. [Tr. p. 47.] But apart from that, the rules of civil procedure for the District Court are to be liberally construed to promote the administration of justice and decisions are to be on the merits and not on procedural niceties. (Moore's Federal Practice, Second Ed., Sec. 1.13, pp. 55 to 56.)

Conclusion.

The judgment of the District Court should be reversed with directions because the judgment flies in the face of well settled rules of construction and the plain language of the policies under consideration.

To adopt the decision of the District Court would compel a rewriting of the policies and inserting provisions which are not found in the policies.

Respectfully submitted,

DONALD ARMSTRONG,

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